No._____

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*

In Error to the Circuit Court of the United States for the District of Washington, Northern Division.

REPLY TO PETITION FOR REHEARING.

JAMES HAMILTON LEWIS,
Solicitor for Appellees.

STRATTON, LEWIS & GILMAN AND FREDERICK BAUSMAN,
Of Counsel.

HINMAN & HANFORD STATIONERY & PRINTING CO., SEATTLE

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To the Honorable Judges of said Court:

Appellees do not tender to the court this compilation as a reply to the petition for rehearing so much as they offer it as a *correction* of the statements made therein, as we deem it sufficient that the statements when corrected in point of fact make unnecessary further comment.

I.

Under point one on page two the appellant insists that the Northern Pacific Railroad Company by its counsel did appear in the said cause, and that such appearance is sufficient for the purpose of an appeal, and that such consent was made on the *21st day of May, 1896.* Counsel say: "*We think the same was filed on the 21st of May 1896.*"

This assertion disposes of the whole matter, for the truth is, as the court's opinion states it, that the assumed consent to jurisdiction by this court given by the Northern Pacific Railroad Company through their counsel was as a fact not filed in the Circuit Court of Appeals until a few days previous to the argument in the month of June, 1896.

Now, assuming that jurisdiction could be assented to by the Northern Pacific where the court has none confessedly without such consent, could such consent avail at the time it was given; it is apparent that the *appearance* and consent which the law allows at all is to the order of appeal as made in the lower court from which the appeal is taken; or, in the language of the books, in that court where severance is to be granted or to which citation issued.

Clearly the court observes that this was not only beyond the period allowed in the law for the time of citation —for the service of citation after the lower court had lost jurisdiction; *but under the statute of limitations the time for an appeal at all had absolutely expired by months.*

The recital in the court's opinion is not only so abso-

lutely correct as from the record but from the petition for rehearing is confessedly so.

We recall to the court that this phase was argued by counsel for appellant and for the appellees orally, and the facts gone over, and the effect of such an attempt to bolster up an omission and wrong, and authorities were cited, particularly one from a neighboring Circuit Court of Appeals, showing that just such an attempt was futile, as it was not an attempt to correct an omission; it was in the nature of an attempt to do a thing that had not been done within time. To do a thing to make good that which without having been done was of itself nothing.

The Circuit Court of Appeals, as was well stated by the decision read to the court, had no jurisdiction to allow appeals and severances. It was not the court from which the appeals were being taken, but the court to which the appeal had already been taken, and all power of the lower court disposed of and at end.

II.

THE APPELLANT ADMITS THE NORTHERN PACIFIC HAS NOT APPEALED.

On pages 2 and 3 of the petition for rehearing, and as is pointed out in the opinion in the record, what the attorneys for the Northern Pacific do is to consent *that the Farmers' Loan & Trust Company may appeal.*

Supposing they did not consent; would it have affected the right of this company to appeal with the proper severance and citation? Certainly not. Supposing the consent of the Northern Pacific had not been

sought at all; would it have mattered one way or the other as to the rights of the Farmers' Loan & Trust Company had they chosen to adopt a severance and serve the Northern Pacific? Assuming all this to have been done in time--supposing the Northern Pacific does consent to the Farmers' Loan & Trust Company appealing, can that add validity to the appeal if it is not properly taken? Can this make good that which is bad in the manner of taking the appeal? Can this consent give the court jurisdiction of the appeal of the Farmers' Loan & Trust Company if the same is not taken in the manner and the way the *law* prescribes in order that the court should obtain jurisdiction?

So admitting that there could be jurisdiction given for any purpose or that this "consent" as it is termed was filed in the lower court instead of the Court of Appeals, does it amount to any thing more than that as between it and the Farmers' Loan & Trust Company it makes no objection to that company appealing? Certainly not.

The Northern Pacific Railroad Company neither by its act or any other act has ever appealed or assumed to appeal, or renounced its intention to appeal, or announced its abiding by the decision; it merely consents to an appeal by one of the parties, reserving to itself the right to appeal itself should subsequent developments upon the Farmers' Loan & Trust Company's appeal not be gratifying to it, the company. This is all of the matter, and upon this statement of the situation uncontroverted, admitted on the record, the dismissal of the case is not only justifiable, but under the law inevitable.

III.

It is too well settled that in the lower court there must have been an appeal by the Northern Pacific Railroad Company, or a renouncement by it of any intention to appeal, and an announcement of its abiding by the decision, and if not this then the law has pointed out that there must be a severance in behalf of the Farmers' Loan & Trust Company, and an order made in the lower court to that effect, and that this is necessary to be so made in the lower court for the purpose of jurisdiction.

Keeping in view that this consent to the Loan Company to appeal in its own behalf for whatever benefit it may be seeking to itself was attempted to be made four months after the appellees appeared in the cause—four months after the cause had been on file in the Circuit Court of Appeals.

We still have that other proposition unmet in any wise that the law is:

(*a.*) Any summons or judgment of severance must be had in the circuit court from which the appeal is taken.

Todd vs. Daniel, 41 U. S. (16 Peters), 521.

(*b.*) *Any severance, therefore, must be had before the return day of the citation, and the writ of error.*

Bacon Abr., 268.

Blunt vs. Snedston, Cro. Jac. 117.

(*c.*) The defects of the parties plaintiff or defendant in error cannot be cured by an amendment.

Thompson vs. Crocker, 1 Salk. 49.

Walter vs. Stokoe, 1 Ld. Raym. 71.
The Protector, 11 Wall. 82.

Whatever privilege of amendment Section 1005 of the Revised Statutes of the United States would permit, it has never been held to permit anything more than the amendment of form.

Here the defect is that all the defendants do not join in the appeal, nor are they served, nor all of them cited, nor does there appear to be any severance. To ground an amendment here would be in violation of Section 1005 of the Revised Statutes.

It has therefore been expressly held by this court that the omission or defect of parties plaintiff or defendant in error is not and cannot be amended nor supplied after the time of the citation and after the cause has been appealed, as such must have existed and the severance must have been adjudicated previous to the issuance of the citation, in order that it may be ascertained who are to be cited.

Estis vs. Trahue, 128 U. S. 225.
Ex Parte Sawyer, 21 Wall. 235.

(*d.*) Therefore, it is held that where there is this substantial defect in the record which cannot be amended in this court, *this court has no jurisdiction.*

Wilson vs. Life Insurance Co., 12 Peters, 140.

It will then of its own motion dismiss the case without awaiting the action of any party, and will do this at any time before judgment.

Hilton vs. Dickinson, 108 U. S. 165.

For the court again asserts that *all the parties against whom a judgment is entered must join in a writ of error, or there must be a proper summons and severance.*

Williams vs. Bank of U. S., 24 U. S. (*11 Wheat.*) *414.*
Owings vs. Kincannon, *32 U. S.* (*7 Peters*), *399.*
Wilson vs. Life & Fire Ins. Co., *37 U. S.* (*12 Peters*), *140.*
Todd vs. Daniel, *41 U. S.* (*16 Pet.*), *521.*
Smyth vs. Strader, *12 How. 327.*
Davenport vs. Fletcher, *16 How. 142.*
Mussina vs. Cavazos, *20 How. 280.*
Clifton vs Sheldon, *23 How. 481.*
Masterson vs. Howard, *10 Wall. 416.*
Hampton vs. Rouse, *13 Wall. 187.*
Simpson vs. Greeley, *20 Wall. 152.*
Fiebelman vs. Packard, *108 U. S. 14.*

These views prohibiting any attempt at modifying or changing the record by addition thereto, or otherwise, after the time for the obtaining of jurisdiction has passed, and after the time the citation calls for the appellees to appear, found a full expression by the Supreme Court of the United States in adopting the views heretofore reached in the case of

Hardee vs. Wilson, *146 U. S. 183*,

where it is held:

"The plaintiff in error moves to amend the writ by adding the immediate parties as complainants, or for a severance, and it is held that the motion must be denied, and the writ of error dismissed."

Following—

Mason vs. U. S., 136 U. S. 581.

But to conclude on this branch,—should the court be inclined to think all these views not well taken, it still could not allow such an amendment, because the statute of limitations of such an appeal has run.

See our principal brief under this point and transcript therein cited.

Estis vs. Trabue, 128 U. S. 225.
Wilson vs. Insurance Co., 12 Peters, 140.

IV.

We again urge to the court that at no time has there been any appearance by the Northern Pacific Railroad Company in the Circuit Court of Appeals *for itself.* The only thing is they appear and limit their appearance to the purpose of consenting to the appeal by the Farmers' Loan & Trust Company *in the manner as made by them.*

Can any one contend that this case being disposed of against the Northern Pacific Railroad that appearance, assuming it to have been made jurisdictionally and to have been made in the lower court, could be urged against the Northern Pacific as an appearance to the merits of the general cause which can bind them on the record as being parties to the appeal?

The case of

Island and Seaboard Coasting Co. vs. Tolson, 136 U. S. 572,

was a motion made to amend under Section 1005 of the Revised Statutes, but that amendment was for the pur-

pose of adding new plaintiffs to the case, to-wit: being an action at law for damages, the motion was to amend the writ of error. This particular proceeding is limited and permitted by Section 1005 of the Revised Statutes, which by its very terms excludes such a privilege in equity causes, where the appeal goes up in the form of an appeal in equity; and if this were not so still

This case could have no bearing as there the motion was to make and take the original appeal.

Here in the case at bar no motion to add other parties is made at all.

Here no motion by the Northern Pacific Railroad Company or in its behalf is made at all.

Here no motion is yet made to amend and take appeal, or to be bound by the appeal through or by the Northern Pacific Railroad Company.

Nor can such or any of such motions be made because the statutes of limitation allowing the privilege of appeal or amendments have all expired months and months ago. Thus it will appear that at no time, in no way, by no process has the Northern Pacific in the past nor now made any appearance for itself in any court having jurisdiction of the appeal.

This disposes of the second point marked third in appellee's motion for rehearing.

V.

Referring to point four of the petition for rehearing, counsel now say that the Northern Pacific did not have to make an appearance, and therefore do not propose to be bound, and that they were not served and were not to the record.

This same matter was urged by learned counsel, Mr. Allen, in arguing the case, and was at once disposed of by calling his attention to facts. A short reference to those facts will suffice as a reminder to the court.

The notice addressed to the Seattle, Lake Shore & Eastern was but one of the different notices, and this was addressed to the company only in the Raskey case, because it was the Seattle, Lake Shore & Eastern Railroad Company which killed the child of the Raskeys, for which judgment was obtained.

The company was then under lease of the Northern Pacific. It had also gone into the hands of a special receiver in behalf of the stockholders, and that particular notice was addressed only in that case, the Northern Pacific still controlling its traffic and its receipts.

The Northern Pacific Railroad Company was also made a party because that was the company that had produced the injuries to Bellinger and Longworth, and all of these companies as one property were being operated by one set of receivers.

The notice to the Seattle, Lake Shore & Eastern was simply a separate notice out of an abundance of caution.

That all of these facts are completely borne out by the record as pointed out by the decision will again be apparent.

(*See Transcript, pp. 1 and 2.*)

That the Northern Pacific was a party cannot be denied now in view of the fact that they were made so both by the order of the court and their voluntary appearance in the lower court to combat that order. That

they were made a party by the order itself made by the court is seen from

(*Transcript, p. 5.*)

That the Farmers' Loan & Trust Company complained that only the Northern Pacific had notice and not themselves as one of the grounds for being specially heard is apparent from

(*Transcript, pp. 6 and 8.*)

Also of their own motion and notice to vacate the order.

(*See Transcript, pp. 10 and 11.*)

Also the order of the court denying such motion.

(*Transcript, pp. 12 and 13.*)

But aside from all this it is familiar law that, as this record discloses, the Northern Pacific Railroad Company came before the court, sought the receiver, had itself put into the hands of a receiver, was a party to the record in the appointment of the receiver, and continued to be a party to all the record and all the proceedings. If there could possibly be any doubt upon this proposition at this time in view of this whole record it is certainly set at rest by

McLeod vs. Albany, 13 C. C. A. 527 (*66 Fed. 378,*) in which it is said: "The other parties (the New Albany Railroad) whose presence is suggested as essential, are parties to the original appeal as holding * * * property subordinate to the lien of complainant. They were in court in the suit in which the receivers were appointed and were *bound to take notice of the interven-*

ing petitions * * * filed in that suit and of the proceedings thereunder. It was not necessary that they should be made formal parties to the petition. *Being parties to the suit they were in fact parties to the intervening petitions.*"

And subsequently this same view is held in an opinion by the Chief Justice of the Supreme Court of the United States presiding at circuit in

Trust Co. vs. Madden, 70 Fed. Rep. 453,

in which it is said: "It is objected by appellant that the Central Trust Company should have been a party to the intervention, but that company was complainant in one of the suits, and bound to take notice of the intervention and proceedings thereunder. McLeod vs. City of New Albany, 13 C. C. A. 525, 66 Fed. 378. If the mortgagee, as observed by Jenkins, J., speaking for the Circuit Court of Appeals in that case, had desired to take an active part in this contest, it should have asked to be heard. This it did not do, nor did it take any means to procure a hearing, or bring to the attention of the circuit court any matters tending to show that such a decree as was rendered was unjust or erroneous in any other particulars than those which could be reviewed on this appeal."

But as this is text law and sustained by the very decisions cited by appellant in their motion to review, and particularly the dissertation of

Foster, Sec. 202;
Beach Equity Practice, Sec. 569–70,

it can hardly require further comment.

VI.

We have to observe, lastly, that aside from the inaccuracies, the mistakes, and the misstatements in point of fact respecting dates and the record made in the petition for rehearing, that should everything in the petition for rehearing be admitted as true, the appellants but disclose a want of parties in the appeal who should be bound by the judgment, and that the time has lapsed by which any error could be corrected, if it were an error in the lower court, or the upper court in any wise obtains jurisdiction of the subject-matter. And we call the court's attention to a parallel situation from the Circuit Court of Appeals in the case of

Threadgill vs. Platt, 71 Fed. Rep. 1,

in which the court has occasion to say, repeating the doctrines of Mussina vs. Cavazos, 6 Wall, and other cases following it: "The United States Circuit Court of Appeals has no jurisdiction in any case where more than six months intervene between the entry of the judgment and the day in which it is sought to maintain the writ of error, or from the time it is sued out; * * * and if the writ is allowed within the time, but yet it is not actually issued and filed in the manner the law requires until the expiration of the time, it will be dismissed, because it is essential that these jurisdictional papers be filed in the lower court."

And this rule has been laid down in reference to papers that are necessary to be filed, in the late Phinney decision.

It is also sustained as a doctrine of the law in

Scarborough vs. Pargoud, 108 U. S. 567.

And this court has too often held to be longer a subject of controversy, that no appearance or consent in this appellate court can give jurisdiction to a subject-matter or to a cause where the omission is an omission to do a thing that the law requires to have been done, or to file a paper that the law requires to have been filed in the *lower court;* but the court proceed to say: "These essential requirements cannot be waived or their waiver consented to by the parties."

Stevens vs. Clark, 10 C. C. A. 379.

Wisely, then, says the main case, that all of these steps must be taken, and taken in the lower court where the law requires they should be taken, to give the higher court jurisdiction; and the failure to take those steps cannot be remedied by an attempt of one of the persons to say "We will waive our rights if you will permit the other to benefit by a wrong or an omission of duty."

Brooks vs. Norris, 11 How. 204.
U. S. vs. Baxter, 2 C. C. A. 410.
Threadgill vs. Platt, 71 Fed. 3.

We submit these corrections merely to aid the court as an index to the record, should it desire any further reference than its opinion.

Respectfully submitted,

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